Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DONALD P. MANGANO, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

63 pp

QUESTIONS PRESENTED

A. Whether the bank fraud statute, 18 U.S.C. § 1344, which makes it a crime to execute a scheme to defraud a financial institution, authorizes multiple punishments where the scheme to defraud alleged by the indictment is completed only once?

B. Whether a count of an indictment charging a violation of the bank fraud statute is deficient where it fails to charge an essential element of the offense—that the defendant "executed" or "attempted to execute" a scheme to defraud a bank—and instead alleges only that the defendant performed an act "for the purpose of" executing a scheme to defraud a bank?

C. Whether a defendant may be convicted of violating the bank fraud statute, which makes it a crime to execute a scheme to defraud "a financial institution," based on evidence that the scheme defrauded federal bank regulators, rather than a financial institution?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

United States of America, plaintiff-appellee.

Donald P. Mangano, Sr., defendant-appellant.

John Lee Molinaro, defendant-appellant (not a party to this petition).

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Donald P. Mangano, Sr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on November 17, 1993.

OPINIONS BELOW

The opinion of the court of appeals, Appendix at 1a (hereafter "App. —"), is reported as *United States v. Molinaro*, 11 F.3d 853 (9th Cir. 1993). The order of the court of appeals denying a petition for rehearing and a suggestion for rehearing en banc, App. 25a, and the district court ruling modified by the court of appeals, are unreported.

JURISDICTION

On petitioner's appeal of his conviction, the Ninth Circuit on November 17, 1993, affirmed the judgment of the district court. *Molinaro, supra.* The Ninth Circuit denied

petitioner's petition for rehearing and rejected his request for rehearing en banc on September 19, 1994. App. 25a.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The following provision is set forth in the Appendix (App. 26a): 18 U.S.C. § 1344.

STATEMENT OF THE CASE

A. Factual Background

This prosecution stemmed from the government's claim that Petitioner Donald P. Mangano, Sr., and his codefendant, John Molinaro, engaged in a fraudulent scheme that allowed them to sell a bank they owned, Ramona Savings & Loan ("Ramona"), for personal financial gain by falsely creating the impression that the bank was profitable. The scheme took considerable time to complete, and involved numerous transactions, among them Mr. Mangano's secret acquisition from Ramona of a large resort condominium complex, Cherokee Village. Ramona had financed Cherokee Village, but the complex had become a large non-earning asset for the bank, affecting the bank's profitability. Mr. Mangano's secret acquisition of Cherokee Village caused Ramona to appear financially healthy, which in turn permitted it to be sold, to the benefit of Mr. Mangano and Mr. Molinaro.

Mr. Mangano has been a quadriplegic confined to a wheelchair since 1957, when, at age twenty, he was struck by bulbar polio and spent eighteen months in an iron lung. Overcoming this severe handicap, Mr. Mangano became a successful businessman. By the late 1970s, he owned his own construction company, and he later earned a $1 million unsecured line of credit with Bank of America. In April, 1984, Mr. Mangano and Mr. Molinaro

purchased Ramona for approximately $3.9 million, each becoming a half-owner of the bank. Mr. Mangano divested himself of his entire interest in Ramona on May 15, 1985, when he sold his fifty-percent share to Mr. Molinaro on a note.

While Mr. Mangano was half-owner of Ramona, Ramona acquired a land lease in Palm Springs, California, to build a resort condominium complex, Cherokee Village. By the time Mr. Mangano sold his interest in Ramona, Cherokee Village was almost complete, and individual units were being shown as sales models. After Mr. Mangano divested himself of all his interest in Ramona, federal bank regulators began to pressure Ramona to sell Cherokee Village. The project had faltered after the tax code changed, affecting the tax benefits for ownership of second homes. By the summer of 1985, only seven of the 180 units had been sold, and Ramona had contracted with a hotel corporation to operate the complex as a resort hotel. Cherokee Village thus represented a large non-earning asset for Ramona. Mr. Molinaro, who had been authorized by Ramona's board of directors to sell Cherokee Village, proposed to Mr. Mangano that he purchase the project.

Mr. Mangano believed that Cherokee Village was a sound project. (This belief ultimately proved to be correct; in later years, Cherokee Village became a successful and profitable resort under a different name.) He was reluctant to purchase the project, however, because he did not wish to assume personal liability for the operation of a hotel. Moreover, he did not wish to assume personal liability for the loans he would have to obtain to buy Cherokee Village, because the loans would affect the ability of his construction company to borrow funds for other projects.

Mr. Mangano ultimately agreed to purchase Cherokee Village after he devised an arrangement that allowed him to avoid personal liability for the loans and the operation

of the hotel. Although the arrangement was impressively complex, expert witnesses at trial testified that it was legitimate and that it reflected and accommodated the interests of both the buyer and the seller.

Under the purchase and sale arrangement, Ramona sold individual Cherokee Village units to three people, Dariano, DeCarlo, and Calvello, their attorney. Each of the units was individually priced in accordance with an independent appraisal; the total sale amounted to $22.816 million. Ramona provided 100% financing, at twelve-and-a-half percent interest for thirty years, and required that the loans to make the purchases be fully secured by first and second trust deeds on each unit. The loans provided that any subsequent purchaser of the property would take the property "subject to" the loans. This provision meant that Dariano, DeCarlo, and Calvello would remain liable for the loan amounts even if they later transferred the units. In addition, the loans were "cross-collateralized" by five parcels of land in Palm Springs that the three men bought from Mr. Mangano.

On the day they bought the Cherokee Village units, Dariano, DeCarlo, and Calvello transferred the units to three subchapter "S" corporations they had formed the day before. The five parcels of land purchased from Mr. Mangano were also transferred to the corporations. Mr. Mangano then purchased 100% of the stock of each of the three corporations for $500,000, with an agreement that required Dariano, DeCarlo, and Calvello to serve as officers and directors of the corporations for one year. The loans that Ramona had made to the three men to enable them to buy the units were still secured by first and second trust deeds on the units, and by the five parcels in Palm Springs. Furthermore, the "subject to" provision of the loans left the three men the obligated parties on the loans. Dariano, DeCarlo, and Calvello retained a sixth parcel of property purchased from Mr. Mangano.

In October, 1985, 136 of the units were sold in this manner. Three months later, in January, 1986, thirty-seven additional units were similarly transferred. Between the dates of the two sales, Ramona agreed to pay $287,000 in bond assessments due on the five parcels of property in Palm Springs.

When the transactions were complete, the three subchapter "S" corporations owned 173 units of Cherokee Village and five parcels of property, all encumbered to Ramona, and Mr. Mangano owned 100% of the stock in the three corporations. Ramona gained by removing a significant non-earning asset from its books and by making a profit of $4 million on the transaction. Mr. Mangano gained by avoiding personal liability both for Cherokee Village as a hotel and for the loans Ramona made to Dariano, DeCarlo, and Calvello to enable them to buy the Cherokee Village units.

The government maintained that the transaction was structured in this manner to fraudulently conceal Mr. Mangano's participation in it. Mr. Mangano maintained that the transaction was a legitimate business arrangement, structured to accomplish Ramona's goals as well as his own. At trial, Stanford law professor Kenneth Scott, former general counsel to the Federal Home Loan Bank Board, and Edith Warkentine, a former law professor at the University of Puget Sound, who had practiced and taught in the areas of secured transactions, commercial loans and real estate transactions, both supported Mr. Mangano. They testified that particular aspects of the transaction, including the use of nominees and the 100% financing, were not uncommon and were grounded in the legitimate interests of the parties.

In January, 1986, Mr. Molinaro reached an agreement to sell his entire interest in Ramona to Donald Stump. When the sale was negotiated, Stump owned a real estate development property called Rancho Cielo, which he had purchased with a $10 million loan from Ramona that

was still outstanding. Before Stump completed his purchase of Ramona, he quitclaimed his interest in Rancho Cielo to Robert Rumney for nominal consideration. (Stump had no equity in Rancho Cielo, since the outstanding note was equivalent to the value of the property.) On the day that the quitclaim was executed, Ramona, through Mr. Molinaro, extended for three years the principal and interest payments on a $40,000 loan to Rumney and paid Rumney $2,000 on an invoice for consulting services.

Later that year, Mr. Molinaro, acting for Ramona, apparently began to negotiate with a third party who wanted to acquire Cherokee Village. Mr. Molinaro therefore sought to repurchase Mr. Mangano's Cherokee Village units. Mr. Mangano and Mr. Molinaro were at odds with each other at this time, and at first could not agree on a price. Ultimately, they agreed on a price of $1 million, and, in April, 1986, Mr. Mangano reconveyed his shares in the subchapter "S" corporations to Dariano, DeCarlo, and Calvello, who then conveyed them to Ramona.

In June, 1986, the Federal Home Loan Bank Board ("FHLBB") began an audit of Ramona. Federal regulators took control of the bank in September, 1986. Cherokee Village continued to operate (under a different name) and became a successful resort.

B. The Indictment

The government obtained a grand jury indictment that charged Mr. Mangano and Mr. Molinaro with thirty counts of bank fraud (18 U.S.C. § 1344) and one count of conspiracy (18 U.S.C. § 371). The indictment also charged Mr. Molinaro alone with two counts of making a false entry in Ramona's books (18 U.S.C. § 1006).

Although Mr. Mangano was charged with thirty separate violations of the bank fraud statute, the indictment alleged a single scheme to defraud Ramona:

> *The scheme* involved a series of sham transactions in October 1985 and January 1986 whereby defendants MOLINARO and MANGANO, without the knowledge or approval of Ramona's officers and directors, caused Ramona to extend loans in the total amount of approximately $29,360,000 to straw borrowers for the purpose of purchasing 173 Cherokee Village units, which were subsequently transferred to defendant MANGANO. *The scheme* enabled defendant MANGANO to secretly acquire Cherokee Village, and allowed defendant MOLINARO to placate the [Federal Home Loan Bank Board] by taking the Cherokee Village investment off Ramona's books.
>
> *The scheme* further enabled defendants MOLINARO and MANGANO to make Ramona appear to be operating at a profit so that Ramona could be sold for $7,200,000, and defendants MOLINARO and MANGANO both could benefit from the proceeds of the sale.

Second Superseding Indictment (hereafter "Indictment") at ¶¶ 19-20 (emphasis added).

Although the thirty counts each charged a separate violation of the bank fraud statute, none of the counts alleged that Mr. Mangano or Molinaro had "executed" or "attempted to execute" the scheme to defraud. Instead, each of the counts identified a separate act and alleged that the act had been committed "for the purpose of" executing a scheme to defraud Ramona.

C. The District Court Proceedings

Before trial, Mr. Mangano moved to dismiss the bank fraud counts on the ground that they were multiplicitous (i.e., that multiple counts in the indictment charged a single crime).[1] The district court denied the motion in a written order. App. 22a.

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[1] When the motion was filed, the indictment charged twenty-seven bank fraud counts. It was not refiled when a second superseding

Trial began on July 18, 1989. On October 4, 1989, the jury returned a verdict of guilty as to all counts.

Mr. Mangano was sentenced on June 11, 1990.[2] The district court imposed three consecutive five-year terms on the first three counts, suspended imposition of sentence on the remaining counts, and imposed five years' probation.[3] Mr. Mangano filed a timely notice of appeal to the Ninth Circuit Court of Appeals.[4]

D. The Direct Appeal

In his direct appeal, Mr. Mangano contended, *inter alia*, that the bank fraud counts were multiplicitous because the indictment alleged only a single scheme which, according to the government and by its very nature, could be executed and completed only once. He also argued that the bank fraud counts failed to state a crime, because

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indictment added three more bank fraud counts. The government argued that Mr. Mangano's failure to refile his motion waived his claim that the bank fraud counts were multiplicitous. The court of appeals rejected the argument. *Molinaro*, 11 F.3d at 858 n.9.

[2] Mr. Mangano was initially sentenced on February 13, 1990. Prior to sentencing, he filed objections to the presentence report, which the court failed to resolve. He was sentenced to fifteen years in prison, a consecutive term of five years' probation, $6.7 million in restitution, and costs of approximately $6,000.

After Mr. Mangano filed a timely notice of appeal, the government conceded, based on an intervening decision of the Ninth Circuit, that the district court had erred in failing to resolve Mr. Mangano's objections to the presentence report prior to sentencing. A new sentencing hearing was therefore held on June 11, 1990, and the same sentence was imposed.

[3] At the time of the conduct for which Mr. Mangano was sentenced, a violation of the bank fraud statute was punishable by five years' imprisonment. It is now punishable by twenty years' imprisonment. *Compare Molinaro*, 11 F.3d at 859 n.11 (statute as of the time of Mr. Mangano's conduct), *with* App. 26a (statute as it currently stands).

[4] Mr. Mangano was granted bail pending appeal and remains on bail at this time.

none of the counts alleged an execution or attempted execution of the scheme. In addition, he argued that the bank fraud statute applies only to a scheme to defraud a financial institution, whereas the district court had allowed the government to argue that the jury could convict if it found that the scheme had defrauded federal bank regulators.

Mr. Mangano's appeal was argued and submitted on December 7, 1992.[5] In an opinion filed on November 17, 1993, the Ninth Circuit agreed in part with Mr. Mangano's argument that the bank fraud counts were multiplicitous. The court held that 18 U.S.C. § 1344 punishes an "execution" or attempted execution of a scheme to defraud, not each act in furtherance of the execution or attempted execution. *Molinaro*, 11 F.3d at 860.

The court's application of its holding, however, conflicted with its own definition of an "execution," conflicted with opinions from at least two other circuits, and was inconsistent with opinions from at least three other circuits. It reconfigured the indictment so that the thirty bank fraud counts charged four bank fraud crimes. The court ordered that Mr. Mangano be resentenced for those four crimes. 11 F.3d at 860-61, 864. It affirmed Mr. Mangano's conviction in all other respects.

On January 3, 1994, Mr. Mangano filed a timely petition for rehearing and suggestion for rehearing en banc. The petition was denied and the suggestion rejected on September 19, 1994. App. 25a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. Since 1991, at least ten circuit court opinions have addressed multiplicity challenges to indictments under the bank fraud statute. Remarkably, in more than half of

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[5] Submission was vacated on December 16, 1992, pending this Court's decision in *United States v. Olano*, 113 S. Ct. 1770 (1993). The appeal was resubmitted on April 26, 1993.

those cases, the courts have concluded that the bank fraud charges were multiplicitous. *See Molinaro, supra*; *United States v. Hord*, 6 F.3d 276, 280-83 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1551, 128 L.Ed.2d 200 (1994); *United States v. Lilly*, 983 F.2d 300, 302-05 (1st Cir. 1992); *United States v. Heath*, 970 F.2d 1397, 1401-02 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1643, 123 L.Ed.2d 265 (1993); *United States v. Saks*, 964 F.2d 1514, 1526 (5th Cir. 1992); *United States v. Lemons*, 941 F.2d 309, 316-18 (5th Cir. 1991). Even the decisions that have rejected multiplicity challenges to bank fraud indictments reveal courts' difficulty in resolving such challenges. *See United States v. Rimell*, 21 F.3d 281, 287 (8th Cir. 1994), *cert. denied*, 1994 WL 532952 (Oct. 31, 1994) (No. 94-6167); *United States v. Brandon*, 17 F.3d 409, 422-24 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 80, 115 S. Ct. 81; *United States v. Barnhardt*, 979 F.2d 647, 650-51 (8th Cir. 1992); *United States v. Hammen*, 977 F.2d 379, 382-83 (7th Cir. 1992).

Until recently, a claim that an indictment was multiplicitous was relatively rare in federal court, and a court of appeals' agreement with such a claim was virtually unheard of. The bank fraud statute, which punishes one who "*executes*" or "*attempts to execute*" a "*scheme to defraud*" a financial institution, has changed that. As the sheer number of the decisions suggests, multiplicity challenges to bank fraud indictments have become matter-of-course, and they often succeed. *See Hord*, 6 F.3d at 278 (noting that the court was "once again" called upon to decide such a challenge). These challenges stem from the inability of the circuit courts to set forth a uniform method for determining what constitutes a bank fraud "unit of prosecution." *See Lilly*, 983 F.2d at 305 (recognizing that "the range of decisions reflects the diversity of factors entering into an evaluation of multiplicity claims under the bank fraud statute").

The extent of the resulting conflict both between and within the circuits is revealed by the different methods,

criteria and tests courts have adopted to determine whether bank fraud charges are multiplicitous. Courts in the Eighth Circuit look to the "contours of the scheme." *See Rimell*, 21 F.3d at 287. The First Circuit endorses a "factors" analysis. *See Brandon*, 17 F.3d at 422. The Fifth Circuit has suggested an "integral relation" test. *See Heath*, 970 F.2d at 1402.

These circuits, along with others, also rely on a less comprehensive approach, focusing on particular—and often conflicting—criteria. For example, one court has ruled that a deposit into a bank account, but not a withdrawal from that account, is an execution of a scheme to defraud, because the deposit places the bank at a risk of loss; another court has ruled that a withdrawal from a bank account is an execution of a scheme; and a third court has ruled that the risk of loss is of no consequence to the multiplicity analysis. *Hord*, 6 F.3d at 280-83; *United States v. Poliak*, 823 F.2d 371, 372 (9th Cir. 1987) *cert. denied*, 485 U.S. 1029, 108 S. Ct. 1586, 99 L.Ed.2d 901 (1988); *Heath*, 970 F.2d at 1402. Similarly, in one court separate executions of a scheme may be found where the defendant's transactions had different purposes, but in another court, separate executions may be found where the transactions had a common purpose. *Molinaro*, 11 F.3d at 860 n.16; *United States v. Harris*, 805 F. Supp. 166, 174-75 (S.D.N.Y. 1992). Some courts have found that each completion of a single scheme can give rise to only one bank fraud crime, even where the completion involves separate transactions; but other courts have ruled that each transaction may give rise to a separate bank fraud crime, even where the transactions are part of one completion of a single scheme. *Compare, e.g., Heath*, 970 F.2d at 1402, *with Molinaro*, 11 F.3d at 860-61.

Mr. Mangano's case illustrates this confusion in resolving multiplicity challenges to bank fraud indictments. He contended that the bank fraud statute punishes each execution of a scheme, not each act taken for the purpose

of executing the scheme, and that the thirty counts of bank fraud for which he was indicted were therefore multiplicitous. The court of appeals agreed. *Molinaro*, 11 F.3d at 860. Mr. Mangano further maintained that his indictment charged only one crime, because it alleged a single scheme, completed and executed only once. The court of appeals, however, grouped together different counts that, it stated, described four "chronologically and substantively independent" transactions, and found what it considered to be four executions. *Id.*

Only a decision by this Court can stem the rising tide of multiplicity challenges to bank fraud indictments. Only this Court can provide the lower courts with appropriate guidance so that the bank fraud statute is uniformly applied. After granting review, this Court should reverse the court of appeals' multiplicity decision in Mr. Mangano's case. The Court should rule that the term "executes," as used in 18 U.S.C. § 1344, means "completes," and that each "completion" of a charged scheme to defraud constitutes a single execution of the scheme and a single violation of § 1344, even where the completion of the scheme requires multiple transactions or acts. Likewise, the Court should hold that each attempted completion of a scheme can give rise to only one violation of § 1344, regardless of the number of acts or transactions involved in the attempt.

2. This case presents a second important question about the bank fraud statute: what must be alleged in a particular count of an indictment to adequately charge the crime of bank fraud.

It is well-established and generally undisputed that each count of an indictment must allege the essential elements of the charged offense. *Dunn v. United States*, 284 U.S. 390, 393, 52 S. Ct. 189, 190, 76 L.Ed. 356 (1932) (Holmes, J.). The bank fraud statute punishes one who "executes" or "attempts to execute" a scheme to defraud a financial institution. For a count of an indictment to allege adequately the crime of bank fraud, then, it must

charge that the defendant "executed" or "attempted to execute" a "scheme."

In Mr. Mangano's case, none of the thirty bank fraud counts alleged an "execution" or "attempted execution" of a scheme. Instead, each of the individual bank fraud counts alleged that a certain act was committed "*for the purpose of*" executing the scheme. This charging language appeared in the individual bank fraud counts of the grand jury's indictment, which was in turn based on the government's flawed theory as to what constitutes a unit of prosecution under § 1344.

The court of appeals erred in not finding the charging language of the individual counts of the indictment, and the counts themselves, deficient. To insure that federal prosecutors are not misinformed as to what must be alleged to adequately charge the crime of bank fraud, this Court should grant review and reverse the ruling of the court of appeals. The Court should hold that, to allege adequately the crime of bank fraud, each count of an indictment must allege that the defendant executed or attemped to execute a scheme to defraud.

3. A third important question about the bank fraud statute presented by this case is the scope of that statute: whether a scheme is punishable under § 1344 if it defrauds federal bank regulators, or whether it must defraud a financial institution.

The indictment in this case alleged that the purpose of the scheme was to defraud Ramona, a financial institution. At the conclusion of evidence, however, the government argued to the jury that it could find Mr. Mangano guilty of the bank fraud counts if it found that the scheme had defrauded federal regulators. The district court overruled Mr. Mangano's objection to this alteration of the indictment and expansion of the statute, and the court of appeals affirmed the district court's decision. *Molinaro,* 11 F.3d at 861.

That ruling conflicts with caselaw in the Second and District of Columbia Circuits that holds that § 1344 applies only to a scheme to defraud a bank. *United States v. Hubbard*, 889 F.2d 277, 280 (D.C. Cir. 1989); *United States v. Blackmon*, 839 F.2d 900, 905-06 (2d Cir. 1988). Although some federal statutes make it a crime to defraud federal bank regulators, § 1344 is not one of them. By its own terms, the statute applies only to a scheme that defrauds or is intended to defraud a "financial institution." The court of appeals' approval of the district court's ruling in this case is thus in error.

To ensure uniform application of the bank fraud statute, and to provide federal prosecutors with guidance as to when the bank fraud statute may be invoked, this Court should grant review and reverse the ruling of the court of appeals on this ground.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE IN DISARRAY AS TO HOW TO RESOLVE MULTIPLICITY CHALLENGES TO BANK FRAUD CHARGES

A. The First And Fifth Circuits Would Have Found Only One "Execution" Under § 1344 In Mr. Mangano's Case

The circuits agree that a unit of prosecution under the bank fraud statute is an "execution" or "attempted execution" of a scheme, and not each act performed to execute the scheme. *See, e.g., Molinaro*, 11 F.3d at 860; *Heath*, 970 F.2d at 1402. However, when the circuits attempt to determine just what constitutes an "execution" of a scheme, their rulings become confusing, inconsistent and conflicting. This case illustrates that conflict: Mr. Mangano's multiplicity claim would have been decided differently had it been raised in the Fifth Circuit or the First Circuit.

The grand jury charged Mr. Mangano and his co-defendant, Mr. Molinaro, with committing a single scheme: to sell Ramona for personal financial gain by

arranging for Mr. Mangano to secretly acquire Cherokee Village and thus falsely make Ramona appear profitable. According to the grand jury, this scheme was executed through a series of transactions that took place over an extended period of time.

The court of appeals agreed with Mr. Mangano that the bank fraud statute punishes each execution or attempted execution of a scheme. *Molinaro*, 11 F.3d at 859-60. It flatly rejected the government's position that the statute punishes each act taken in furtherance of the scheme. As it explained, "If each act in furtherance of a scheme to defraud a bank were a separate violation, a single criminal transaction could result in an infinite number of prosecutable offenses having no particular relevance to the purpose of the statute." *Id.* at 860 (citing *Lemons*, 941 F.2d at 318) (footnote omitted). According to the indictment, Mr. Mangano and his codefendant effected a single scheme to defraud Ramona. Indictment at ¶¶ 19-20. This is made plain by the indictment's charging language. Each of the individual thirty bank fraud counts alleged that a particular act was committed "*for the purpose of*" executing or attempting to execute the single scheme to defraud. *See, e.g.*, Indictment at ¶¶ 41, 50, 56, 59, 64 (emphasis added). Thus, although the single scheme involved multiple transactions, all of the transactions had the same purpose: to complete, or attempt to complete, the scheme. Indictment at ¶¶ 19-20. The indictment did not allege that the single scheme was repeated, or that it was executed or completed more than once. In fact, the scheme by its very nature could not be completed more than once. Therefore, the court should have ruled that the multiple bank fraud counts in the indictment charged only a single violation of § 1344.

The court of appeals did not, however, count the number of § 1344 violations the indictment charged by asking how many times the single scheme had been completed or executed. Rather, the court conducted a plenary review of the indictment to determine how many "execu-

tions" it could find. It ignored the charging language of the indictment, grouped together four sets of acts, and concluded that the indictment contained four executions.[6]

Caselaw from the Fifth Circuit demonstrates that Mr. Mangano's case would have been decided differently there. In *Lemons, supra*, the defendant defrauded a bank into approving and partially funding a $46 million loan for a residential and commercial development. For his part in the scheme, Lemons obtained personal financial benefit from a series of payments. The scheme involved numerous transactions, the execution of numerous documents, and numerous payments and other transfers of money. In attempting to determine whether the nine bank fraud counts in the indictment were multiplicitous, the court recognized that the word "executes," as used in § 1344, means "completes." 941 F.2d at 318. Accordingly, as the court also recognized, the bank fraud statute punishes each "completion" of a scheme as a separate crime; if a series of acts or transactions are all committed to complete a scheme, they all constitute a single crime, not multiple separate crimes. Using this analysis, the court in *Lemons* determined that the individual bank fraud counts constituted a single violation of § 1344. As the court explained, "[t]he movement of the benefit to Lemons, although in several separate stages or acts, was only part of but one performance, one completion, one execution of that scheme." *Id.*

Under the *Lemons* analysis, the thirty bank fraud counts in Mr. Mangano's indictment were multiplicitous, because they constituted only one violation of § 1344. The scheme charged in Mr. Mangano's case, under which

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[6] In the court's view, the transfer of the first 136 units of Cherokee Village and the later transfer of thirty-seven units were each an execution. *Molinaro*, 11 F.3d at 860. The court found a third execution in the concealment of Mr. Mangano's ownership interest in the five parcels of land in Palm Springs on which Ramona paid assessment bonds, and a fourth in the transfer of the Rancho Cielo property to Rumney. *Id.*

Mr. Mangano benefitted from Ramona's sale, involved multiple transactions and hundreds of documents and transfers of money, but all of those transactions, documents, and transfers were part of one performance, one completion, and one execution of the scheme.

The indictment against Mr. Mangano would be held to charge only a single violation of § 1344 under the First Circuit's analysis as well. In *Lilly*, *supra*, Lilly, a developer, sought financing to acquire an apartment complex and convert it to condominiums. He "pre-sold" twenty-nine of the units on a no-money-down basis with a promise of full financing, but had the purchasers sign documents that falsely inflated the prices of the units so that they appeared to have made down payments of ten percent. Those documents were submitted to a bank, and the accompanying individual mortgages assigned to the bank. The bank agreed to provide Lilly with a loan for $7 million for the project. Within a few months, Lilly had sold the project for $9 million. *Lilly*, 983 F.2d at 302. Lilly was indicted and charged with twenty-nine counts of bank fraud, one for each of the mortgages submitted and assigned to the bank.

The First Circuit concluded that all twenty-nine counts constituted a single violation of § 1344. 983 F.2d at 304. Lilly's scheme was to induce the bank to fund a loan so that he could acquire and then sell the project for personal gain. While the scheme involved countless acts, and was performed in distinct stages, it was completed and executed only once. The same is true in Mr. Mangano's case.

B. Lower Courts Have Adopted Confusing And Inconsistent Methods For Analyzing Multiplicity Challenges

The conflict and confusion in the opinions and rulings of the circuit courts is much broader than the conflict between the Ninth Circuit's decision in Mr. Mangano's case and First and Fifth Circuit decisions in *Lilly* and

Lemons. That conflict and confusion may be seen by examining the various methods the courts have endorsed in resolving bank fraud multiplicity claims.

In the Eighth Circuit, courts utilize a "contours" analysis to resolve bank fraud multiplicity claims. *See Barnhardt*, 979 F.2d at 651. Under this test, a court first determines the "contours" of the scheme and then determines how many times the defendant executed the scheme. Each execution is a separate offense. *Id.* As applied, however, the "contours" method does not provide any meaningful assistance in determining what constitutes an execution of a scheme.

For example, in *Rimell*, *supra*, the contours of the defendant's scheme were to use nominees to buy real property, purchase the property from the nominees at a higher price, obtain loans based on the higher price, and then divide the excess loan proceeds among himself and his employees. 21 F.3d at 283. Five properties were purchased in this way, and six banks were defrauded. The indictment charged eleven counts of bank fraud. The court upheld all eleven counts against the defendant's claim of multiplicity, but failed to explain how the defendant's "simple bank fraud scheme," through which he had defrauded six banks in connection with five properties, could be executed eleven times. *Id.*

The First Circuit has endorsed a "factors" test to determine how many executions, and thus how many separate crimes, are charged in a bank fraud indictment. *See Brandon, supra*; *Lilly*, *supra*. According to the court in *Brandon*, the factors include the number of banks, the number of transactions, and the number of movements of money. *Brandon*, 17 F.3d at 422. However, in *Brandon*, none of these factors made any difference in the court's decision. That case involved one bank, three methods for perpetrating the scheme, 176 separate loans, more than 176 transactions, and countless movements of money. *Id.* at 418-21. The court found that the twenty-six counts of bank fraud were not multiplicitous, and

suggested that the government could have charged 150 more, one for each loan. *Id.* at 423.

The Fifth Circuit has suggested that an "integral relation" test be used in determining whether separate transactions are part of a single execution or are multiple separate executions. *See Heath, supra.* In *Heath*, the defendants employed multiple misrepresentations to obtain two loans, one for $10 million and one for $3 million, from a single bank. The government argued that each loan constituted a separate crime of bank fraud, because each loan subjected the bank to a separate risk of loss. 970 F.2d at 1401. The court ruled, however, that the defendants had committed only one crime and only one execution of the charged scheme, because the two loans were "integrally related;" both were obtained to complete the scheme to sell thirty acres of Florida real estate owned by the defendants' bank. *Id.* at 1402.

Shortly after *Heath*, the Fifth Circuit considered a bank fraud indictment based on a scheme in which a defendant five times deposited bogus checks into a bank account and then attempted three times to withdraw the funds. *Hord, supra.* Although the court in *Heath* had rejected the argument that each separate risk of loss constitutes a separate execution, the court in *Hord* ruled that each deposit was a separate execution, because "[w]ith each deposit [the bank] was put at risk." 6 F.3d at 282. The court thus concluded that the nine counts of bank fraud in the indictment actually charged five crimes, one for each deposit. *Id.* at 281-82. In reaching this conclusion, however, the court recognized that there is "strong support for the rule that the scheme must be completed or performed in order for it to be executed." *Id.* at 282 (citing *Lemons*, 941 F.2d at 318).[7]

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[7] **The ruling in *Hord* also conflicted with the Ninth Circuit's decision in *Poliak*, 828 F.2d at 372 (holding that each draft on a bank account was a separate execution of a scheme to defraud).**

Other courts have used other analyses in attempting to determine what constitutes an execution of a scheme to defraud. For example, in *United States v. Mancuso*, 799 F. Supp. 567, 571 (E.D.N.C. 1992), the court concluded that "the common thread among the cases is that a scheme or artifice to defraud is 'executed' by the movement of money, funds or other assets from the institution." That common thread, however, is not to be found in either *Hord* or *Heath*, which, as demonstrated above, also contradict each other. Furthermore, that common thread is inconsistent with both the Fifth Circuit's decision in *Lemons* (in which the court found that multiple movements of money comprised a single execution) and the Ninth Circuit's decision in *Molinaro* (in which the court grouped multiple movements of money to find four executions).

In Mr. Mangano's case, the court of appeals concluded that the indictment contained four executions because, it contended, each of the four groups of transactions it found had a different purpose. *Molinaro*, 11 F.3d at 861. However, the court also stated that "two transactions may have a common purpose but constitute separate executions of a scheme." *Id.* (citing *Harris, supra*). *Harris*, the case cited by the court, introduces yet another test: a transaction is a separate execution if it imposes a separate obligation to make a truthful statement, even if it is integrally related to other transactions, and even if it does not expose the bank to any greater loss. *Harris*, 805 F. Supp. at 175.

C. This Court Should Rule That An "Execution" Is A "Completion" Of A Scheme

The confusion and conflict among the circuits has arisen from courts' repeated attempts to define an "execution" of a scheme. This Court should allay lower courts' difficulties by ruling that a unit of prosecution under § 1344 consists of a "completion" of the scheme

charged by the indictment or each completion that is attempted.

Such a ruling is consistent with the terms and purpose of the bank fraud statute. By prohibiting the execution of a scheme to defraud, the bank fraud statute makes each completion of a scheme a single crime. The very use of the term "execution" implies a completion. *See Lemons*, 941 F.2d at 318 (citing Black's Law Dictionary 567 (6th ed. 1991)). Moreover, if a single completion of a scheme can consist of multiple executions, and thus multiple violations of § 1344, the number of potential crimes from a single scheme to defraud becomes virtually limitless and an "execution" becomes impossible to define. *See Molinaro*, 11 F.3d at 860.

If an execution of a scheme is equivalent to a completion of the scheme, prosecutors will know that only a single count of bank fraud should be charged for each completion of the scheme to defraud or each completion that is attempted. If prosecutors fail to follow that rule, district courts will know that the counts are multiplicitous.[8]

D. The Indictment In This Case Alleged That Mr. Mangano Completed The Scheme Only Once And Thus Committed Only One Violation Of § 1344

In deciding Mr. Mangano's appeal, the Ninth Circuit failed to consider Mr. Mangano's multiplicity claim in light of the scheme charged in the indictment. As charged in the indictment, that scheme was to sell Ramona to his and Mr. Molinaro's benefit. Thus, the indictment charged a scheme that could by its very nature be completed only once.

If the scheme could be completed only once, it could not be executed more than once, even though it encom-

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[8] Where a single scheme is completed more than once, each completion is a separate violation of § 1344. *See Poliak, supra.*

passed separate transactions. Thus, according to the circuit court's own definition of a unit of prosecution, there could be only one crime, because there was only one completion—and thus only one execution—of the charged scheme.

The court of appeals found four executions. If there were four executions, however, the scheme must have been completed four times. But the four groups of transactions that the court labelled executions were actually only stages in the one-time completion of the single scheme charged by the grand jury.

The court concluded that each group of transactions was an "execution" because it found that each was "chronologically and substantively independent." *Molinaro*, 11 F.3d at 860. Whether the groups of transactions were chronologically independent is perhaps a close question, but there is no question that, under the language of the indictment, the transactions were substantively *interdependent*. The grand jury alleged that all of the acts were committed for the same purpose: to complete the scheme to defraud that would allow Mr. Mangano and Mr. Molinaro to sell Ramona for personal financial gain. (Moreover, the court's definition of an execution as a group of acts that is chronologically and substantively independent of other acts suggests that the court actually defined a scheme rather than an execution.)

E. Review Should Be Granted

Whenever circuit courts reverse more than fifty percent of district court rulings on a particular issue, something is wrong. According to the published cases, sixty percent of the circuit court opinions (six of ten) have found that district courts incorrectly denied multiplicity challenges to bank fraud charges and that prosecutors improperly drafted the charges. In addition to the obvious harm to defendants, such a reversal rate represents an enormous waste of resources and duplication of effort to the government, the public, and the judiciary.

There is nothing about the current opinions, either individually or collectively, that suggests that either the number of challenges or the reversal rate will decrease. To the contrary, given the widespread variations in the opinions and the number of challenges that have been successful, it is reasonable to expect that matters will get worse. Only a decision by this Court can provide the guidance and controlling principles needed by prosecutors to draft bank fraud indictments, by defense attorneys to determine whether bank fraud charges may be challenged, and by federal judges to decide such claims. To insure the uniformity of federal law, and to limit multiplicity challenges to bank fraud charges, this Court should grant review.

II. EACH OF THE BANK FRAUD COUNTS FAILED TO STATE A CRIME

A. Each Count Of An Indictment Must Adequately Allege A Crime

To properly allege a crime, a count of an indictment must identify and sufficiently describe the elements of the charged offense. *See Dunn*, 284 U.S. at 393, 52 S. Ct. at 190, 76 L.Ed. 356. Any count of an indictment that fails to allege a crime is defective, and must be dismissed upon a timely motion. *See id.* (holding that "[e]ach count in an indictment is regarded as if it was a separate indictment") (citations omitted); *see also Selvester v. United States*, 170 U.S. 262, 18 S. Ct. 580, 42 L.Ed. 1029 (1898) (holding that a jury's verdict on individual counts of an indictment is not rendered invalid by its failure to reach a verdict on other counts).

Under the Court's decision in *Dunn*, none of the bank fraud counts in the indictment against Mr. Mangano can stand, because not a single one would stand when regarded, as all must be, as a separate indictment. The court of appeals thus erred in affirming the district court's denial of Mr. Mangano's motion to dismiss the bank fraud counts.

B. The Charging Allegations In The Bank Fraud Counts

Each of the bank fraud counts identified a particular act, and alleged that the act was performed "for the purpose of" executing and attempting to execute the scheme. This language reflected the government's mistaken view that § 1344 punishes each act in furtherance of the charged scheme to defraud. None of the counts alleged that Mr. Mangano had actually executed or attempted to execute a scheme to defraud, and none of the counts described the scheme to defraud.

C. The Individual Counts Were Deficient

As discussed above, the court of appeals rejected the government's contention that each act in furtherance of a scheme to defraud is a separate crime, holding instead that each execution or attempted execution of a scheme to defraud is a separate violation of § 1344. *Molinaro*, 11 F.3d at 860.

Thus, for an indictment, or any individual count of an indictment, to adequately charge a violation of § 1344, the grand jury must allege in each count that the defendant executed or attempted to execute the scheme to defraud. Furthermore, the grand jury must in each count identify, explicitly or by incorporation, the scheme to defraud. An allegation that the defendant committed an act "for the purpose of" executing the scheme is simply insufficient to allege a crime.

Since each of the bank fraud counts alleged only that Mr. Mangano committed an act "for the purpose of" executing and attempting to execute the scheme, *see, e.g.*, Indictment at ¶¶ 41, 50, 56, 59, 64, and did not allege that Mr. Mangano executed or attempted to execute the scheme, each of the thirty bank fraud counts was deficient and failed to allege a crime.

D. Review Should Be Granted

Until the Ninth Circuit's decision in Mr. Mangano's case, that circuit followed this Court's decision in *Dunn*, as it was required to do, and had consistently ruled that each count of an indictment must sufficiently describe the crime charged. *See United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) (holding that "each individual count within an indictment must stand on its own"). Indeed, in *LeCoe* the Ninth Circuit recognized "the sanctity with which the courts, including the Supreme Court, have accorded each individual count" of an indictment. *Id.* at 404.

Other federal courts have also consistently obeyed this Court's decision in *Dunn*. *See United States v. Winter*, 663 F.2d 1120, 1138 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S. Ct. 1250, 75 L.Ed.2d 479 (1983); *United States v. Hernandez*, 980 F.2d 868, 871 (2d Cir. 1992); *United States v. Werme*, 939 F.2d 108, 111 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1165, 117 L.Ed.2d 412 (1992); *United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 839, 101 S. Ct. 116, 66 L.Ed.2d 46 (1980).

The court of appeals' decision in Mr. Mangano's case breaks with this precedent. It upholds individual counts of an indictment that fail to allege the essential elements of the charged crime. While such a decision might ordinarily be regarded as an anomaly, not deserving of review by this Court, the confusion in the circuits concerning the interpretation and application of the bank fraud statute counsels against simply ignoring the court of appeals' action.

Review of the court of appeals' decision on this issue presents an opportunity for this Court to provide much-needed guidance to the circuit and district courts, as well as federal prosecutors, concerning the essential elements of a § 1344 violation and what must be alleged to prop-

erly charge a defendant with violating that statute. Failure to address this issue will permit prosecutors to obtain voluminous indictments in one circuit but not in others, making national application of the bank fraud statute uneven. Allowing the Ninth Circuit's decision to stand subjects defendants in that circuit—but not in other circuits—to the risk of double jeopardy, as they may be found guilty on multiple counts for a single crime. The Court should grant Mr. Mangano's petition. It should hold that the bank fraud counts in Mr. Mangano's indictment failed to allege a crime and should have been dismissed for that reason.

III. THE BANK FRAUD STATUTE PUNISHES A SCHEME TO DEFRAUD A FINANCIAL INSTITUTION, NOT A SCHEME TO DEFRAUD FEDERAL REGULATORS

A. The Government Relied On Proof Of A Fraud Against The Regulators To Prove The Bank Fraud Charges

The bank fraud statute punishes a scheme "to defraud a financial institution." 18 U.S.C. § 1344(1). The bank fraud counts in the indictment against Mr. Mangano complied with this requirement, charging that the scheme was to defraud "Ramona, its officers, directors, depositors and investors."

During the charging conference, however, the government announced for the first time that it was altering the theory of fraud alleged in the indictment. The prosecutor told the court and defense counsel that "the basis for our bank fraud theory" was that the defendants did not "report accurately to . . . the regulators." Transcript of Proceedings, 9/26/1989, at 20 (hereafter "RT: —/—: —"). Throughout the charging conference, the government emphasized that it was going to argue in summation that the bank fraud counts were proved by evidence that the defendants defrauded or deceived the

government or federal regulators. RT: 9/26: 15-16, 20, 41-48.

The defendants vigorously objected to this change in the factual basis for the bank fraud charges. *Id.* Although the court did not instruct the jury on the new factual basis, the court authorized the government to argue to the jury that Mr. Mangano was guilty of the bank fraud counts if the bank regulators were defrauded. RT: 9/26: 48-50. Accordingly, in its initial summation and in its rebuttal summation, the government described the way in which the federal regulators were defrauded and stated that the scheme was to deceive federal regulators. RT: 9/27: 26, 34, 57-58; RT: 9/28: 156.

The change in the factual basis of the bank fraud charges—from a finding that the statute required a fraud on Ramona itself to a finding that the statute included fraud on federal regulators—constituted an impermissible variance and impermissibly expanded the scope of § 1344.

B. The Court Of Appeals' Ruling Is In Error And Conflicts With The Decisions Of Other Circuits

In affirming the district court, the court of appeals authorized a conviction under the bank fraud statute based on proof that a scheme to defraud was perpetrated against federal bank regulators. *Molinaro*, 11 F.3d at 861. There are statutes that make it a crime to defraud bank regulators, *see, e.g.*, 18 U.S.C. §§ 1005, 1006, but 18 U.S.C. § 1344 is not one of them.

The court of appeals attempted to explain its ruling by stating that "[t]he fact that appellants' misrepresentations were designed to conceal their fraudulent conduct from the [FHLBB] does not mean the appellants defrauded only the regulators." 11 F.3d at 861. This explanation does not cure the impermissible expansion of § 1344, however, because it ignores the government's explicit argument that the jury should find Mr. Mangano guilty of

bank fraud if it found a scheme to defraud federal bank regulators. RT: 9/27: 26, 34, 57-58, 59; RT: 9/28: 156. Under the court of appeals' decision, then, a defendant in the Ninth Circuit can be found guilty of a violation of § 1344 based on proof that he or she executed a scheme to defraud federal regulators.

The decision of the court of appeals puts the law of the Ninth Circuit in conflict with the law of the Second and District of Columbia Circuits. The Second Circuit, in *Blackmon, supra,* after conducting an extensive analysis of the legislative history of § 1344 and giving deference to the intended broad scope of the statute, correctly concluded that the subject and victim of a fraud under § 1344 must be the bank. 839 F.2d at 905-06. The District of Columbia Circuit agrees. *Hubbard, supra.* As the court stated in *Hubbard,* "[t]o be sure, § 1344 only covers frauds against banks themselves." 889 F.2d at 280.

C. Review Should Be Granted

Whether the bank fraud statute reaches a scheme to defraud federal regulators is yet another aspect of § 1344 about which the circuits are in conflict. The conflict on this issue itself justifies granting review. Together with the other questions concerning § 1344 raised in this petition, it points to the need for this Court to provide authoritative guidance in interpreting and applying the bank fraud statute.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals as to each of the questions stated above.

Respectfully submitted,

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Dated: November 3, 1994

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APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 90-50131, 90-50133 and 90-50375

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

JOHN LEE MOLINARO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DONALD P. MANGANO, SR.,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DONALD P. MANGANO, SR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California

Submitted on the Briefs Dec. 7, 1992 *
in No. 90-50131

Argued and Submitted Dec. 7, 1992
in Nos. 90-50133 and 90-50375

Submission Vacated Dec. 16, 1992

Resubmitted April 26, 1993

Decided Nov. 17, 1993

Before: BROWNING, SCHROEDER and FLETCHER, Circuit Judges:

JAMES R. BROWNING, Circuit Judge:

John Molinaro and Donald Mangano appeal their convictions of bank fraud in violation of 18 U.S.C. § 1344 and conspiracy to defraud the United States in violation of 18 U.S.C. § 371. Molinaro also appeals his conviction of making false entries in the books and records of a savings and loan association in violation of 18 U.S.C. § 1006.[1]

I. *Factual Background*

The charges arose out of several transactions involving the Ramona Savings and Loan, a federally insured savings and loan owned by appellant Molinaro.

The government's principal claim is that appellants concealed Mangano's role as the purchaser of 178 units in Cherokee Village, a failing 180 unit condominium project, sold to Mangano by Ramona. The government claimed appellants concealed the fact that Mangano was the purchaser to avoid scrutiny of the transaction by the Federal Home Loan Bank Board, which was on the verge of taking over Ramona because of its precarious financial

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*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.**

[1] Mangano was not charged with this crime.

position resulting from Ramona's inability to sell the condominiums in which it had invested over $25,000,000. The federal regulators had expressed concern over Ramona's heavy concentration of assets in real estate development projects. The sale of the condominiums at a stated price of $29 million allowed Ramona to show a paper profit of $4,000,000 and temporarily appease the Board.[2]

Mangano had been a fifty percent owner of Ramona until shortly before the sale.[3] The parties were understandably concerned that the Board would closely scrutinize the transaction and its impact on Ramona's financial condition if the Board were aware of the purchaser's identity.

To conceal Mangano's participation, the Cherokee Village units were sold to three Subchapter S corporations formed by three individuals, Dariano, DeCarlo and Calvello, to act as straw buyers. Mangano then purchased the corporations from the three individuals. All documents submitted to the bank were signed by Dariano, DeCarlo and Calvello as officers and directors of the three corporations. Initially, 136 of the Cherokee Village units were transferred to Mangano in this fashion. The remaining units were transferred to the corporations three months later. Although Mangano then owned all the stock of the "S" corporations, none of the documents submitted to the bank at the time of the record sale reflected that fact. DeCarlo, Dariano and Calvello had remained officers of the corporations, and Patricia Mangano, Mangano's daughter-in-law and a Ramona employee, signed their names to the documents.

In addition to concealing Mangano's role in the sale of the Cherokee Village units, the government alleged that

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[2] Ramona agreed to finance 100% of the sale price and to collect no interest for two years.

[3] Molinaro and Mangano jointly purchased Ramona for $3.9 million. About a year later, appellants dissolved their partnership and Mangano sold his fifty percent interest in Ramona to Molinaro.

appellants fraudulently caused Ramona to pay $287,000 in street improvement bond assessments due on five parcels of Palm Springs land. Mangano had transferred this land to the three "S" corporations to serve as collateral for the loans made to finance the first sale of condominiums and as a means to pay off the straw purchasers. Like the records submitted to the bank in connection with the sale, no documents relating to the payment of the bond assessments revealed Mangano's interest in the property.

The other bank fraud charges involve steps taken to facilitate regulatory approval of the sale of Molinaro's entire interest in Ramona to Donald Stump by concealing the fact that Stump owed Ramona $10 million, representing 100% financing by Ramona of the purchase of Rancho Cielo by Stump less than six months before he and Molinaro opened negotiations for Stump's purchase of Ramona. Around the time of the negotiations, Stump quitclaimed Ranco Cielo to Robert Rumney, Inc., a corporation owned by Mangano's friend, Robert Rumney. The government alleged that to pay Rumney for his participation, appellants fraudulently induced Ramona to extend the term of a prior $40,000 loan to Rumney for an additional three years and to pay Rumney $2,000 for "consulting services" he had not performed.

The remaining charges involve false entries in Ramona's books and records in connection with Mangano's sale of all 173 Cherokee Village units back to Ramona. The indictment alleged the false entries were intended to make the transactions appear profitable and forestall the possible takeover of Ramona by the Board.

The Board began an audit of Ramona in June 1986. The federal regulators took over the bank the following September, after discovering that the various transactions involving Cherokee Village had caused Ramona's net worth to drop below zero. Appellants were charged in a thirty-three count indictment with bank fraud, conspiracy

to defraud the United States and making false entries in Ramona's books and records.

After a four-month trial, Molinaro was convicted on all counts and Mangano was convicted on counts 1 through 31.[4] The district court sentenced Mangano to three consecutive five-year terms on the first three counts. The court suspended the imposition of sentence on the remaining counts and imposed five years probation. Molinaro received a similar sentence, except that the court imposed only a two-year term on the third count.

II. *Bank Fraud*

Appellants challenge their convictions on the bank fraud counts on three grounds: (1) the evidence was insufficient, (2) the proof at trial constituted an amendment to or variance from the indictment, and (3) the counts were multiplicitious.

A. *Sufficiency of the Evidence*[5]

Mangano argues that because he fully disclosed his participation in the transactions to Ramona's authorized representatives, the government failed to prove he defrauded Ramona. However, "[i]t is the financial institution itself—not its officers or agents—that is the victim of the fraud the statute proscribes." *United States v. Saks*, 964 F.2d 1514, 1518 (5th Cir.1992) (rejecting defendants' claim that failure to disclose a third party would be the beneficiary of a loan was not bank fraud because the banks' financial officers were aware of the fact).

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[4] Mangano was not charged with the false entry violations alleged in counts 32 and 33.

[5] We review the sufficiency of the evidence "in the light most favorable to the prosecution" to determine whether "any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis omitted).

Mangano argues there is no evidence he directed Ramona's representatives to conceal information from Ramona. There was evidence, however, from which a rational juror could infer Mangano was responsible for the various deceptions undertaken to defraud. Mangano was the architect of the transactions, and personally structured them in such a way that documents submitted to Ramona did not reveal his role as purchaser.[6] Marks, Ramona's loan officer, testified he expressed concern to Mangano about DeCarlo's, Dariano's and Calvello's ability to repay the loans and Mangano told him it was none of his business. The prosecution presented strong circumstantial evidence that the individuals who caused Ramona to pay the bond assessments and Robert Rumney's "consulting fee" did so on Mangano's instructions.[7]

Mangano argues the government offered no proof of his intent to defraud. The structure of the transactions alone suggests an intent to defraud. Moreover, Calvello testified Mangano told him it was necessary to conceal Mangano's participation in the sale because federal regulators would "frown" on the transaction. Mangano ar-

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[6] Calvello testified Mangano described the structure of the transaction to him, directed him to form the "S" corporations for the purpose of purchasing the property and supervised the execution of all documents; Norm Marks, Ramona's loan officer, and Geraldine Balough, one of Ramona's directors, testified Mangano instructed them as to the preperation of the documents relating to the transactions; and Balough testified she prepared the documents in Mangano's offices.

[7] Patricia Mangano testified Mangano gave her the bond assessments and told her to present them to Ramona for payment. Rumney testified that Mangano contacted him about the purchase of the Rancho Cielo property, that Mangano and Molinaro were both advised Rumney needed an extension of his outstanding loan from Ramona, and that Molinaro and Mangano told him he would need $2,000 to reactivate the corporation used for the straw purchase of Rancho Cielo. Rumney also testified documents relating to the loan extension, the $2,000 payment to Rumney and the transfer of the Rancho Cielo property were prepared in Mangano's offices.

gues he had no motive to conceal his role in the sale because he no longer owned stock in Ramona and therefore Board approval was no longer required. However, Mangano sold his fifty percent interest in Ramona only a few months earlier, and clearly his purchase of one of Ramona's most substantial assets shortly thereafter would excite the Board's interest and invite closer scrutiny of Ramano's solvency.[8]

B. *Multiplicity*

Appellants argue each of counts 1 through 30 purporting to charge a violation of the bank fraud statute charges a step in the same scheme to defraud and are therefore multiplicitous.[9]

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[8] Mangano also argues that the transactions were not so one-sided as to be fraudulent. However, proof that a transaction is one-sided, or even that the victim sustained a loss, is not a requirement under § 1344. *See United States v. Bonallo*, 858 F.2d 1427, 1433 n. 7 (9th Cir.1988).

[9] The government argues Mangano failed to preserve the claim of multiplicity for review because he challenged only the first and not the second superseding indictment on this ground. Appellants filed and fully briefed a motion to dismiss the first superseding indictment on grounds of multiplicity. The government's second superseding indictment included two additional bank fraud counts but did not otherwise change the indictment in any substantial way. Indeed, the district judge acknowledged the two indictments were substantially similar in his order denying the motion to dismiss, filed three months after the return of the second superseding indictment. Under the circumstances, a renewed motion to dismiss was unnecessary. *See Wood v. Alaska*, 957 F.2d 1544, 1548 (9th Cir.1992).

The government also argues Molinaro failed to preserve the multiplicity claim because he failed to join in Mangano's motion to dismiss on this ground. We conclude, however, that the need to avoid the manifest injustice that would result from treating similarly situated codefendants differently outweighs the federal interest in compliance with procedural requirements in the circumstances of this case. *See United States v. Baker*, 999 F.2d 412, 416 (9th Cir.1993).

Under the heading "The Scheme," the indictment alleges that beginning in September, 1986, appellants and others "knowingly executed and attempted to execute a scheme to defraud Ramona, its officers, directors, depositors and investors, and to obtain money and property under the custody and control of Ramona by false and fraudulent pretenses and representations." The indictment continues, "the scheme involved a series of sham transactions in October, 1985 and January, 1986 whereby Molinaro and Mangano, without the knowledge or approval of Ramona's officers and directors, caused Romona to extend loans in the total amount of approximately $29,360,000 to straw borrowers for the purpose of purchasing 173 Cherokee Village units, which were subsequently transferred to defendant Mangano. The scheme enabled defendant Mangano to secretly acquire Cherokee Village, and allowed defendant Molinaro to placate the Board by taking the Cherokee Village investment off Ramona's books." The scheme also "enabled appellants to make Ramona appear to be operating at a profit so that Ramona could be sold for $7,200,000, and defendants Molinaro and Mangano both could benefit from the proceeds of the sale."

The indictment then alleges the details of the scheme under the following headings: "OCTOBER, 1985 TRANSFERS" (describing the steps taken and documentation prepared to effectuate the transfer of 136 Cherokee Village units from Ramona to Mangano); "JANUARY, 1986 TRANSFERS" (describing the steps taken and the documentation prepared to effectuate the transfer of an additional 37 Cherokee Village units from Ramona to Mangano and to pay an assessment bond levied against collateral); "ATTEMPTED SALE OF RAMONA (describing the steps taken and documentation prepared to effectuate the sale of Ramona to Stump); and "RAMONA's REACQUISITION OF CHEROKEE VILLAGE" (describing the steps taken and the documentation prepared to effectuate the reacquisition by Ramona of 173 Cherokee Village units).

The 30 counts alleging violations of the bank fraud statute are interspersed among the allegations describing the transactions under the first three headings. Each of these counts identifies one of the documents prepared in connection with executing the transaction described in the portion of the indictment in which the count appears and alleges the particular document was "signed and submitted to Ramona . . . for the purpose of executing and attempting to execute the above described scheme to defraud and to obtain money or property by false and fraudulent representations."

The form of the indictment as a whole and of the individual counts reflects the government's preferred view that each act in furtherance of the overall scheme to defraud the bank constituted a separate violation of § 1344. The First and Fifth Circuits have rejected this view, holding that each "execution" of a scheme to defraud a financial institution, rather than each act in furtherance of such a scheme, constitutes a violation of § 1344. *See United States v. Lilly,* 983 F.2d 300, 303 (1st Cir. 1992); *United States v. Lemons,* 941 F.2d 309, 318 (5th Cir.1991).[10] *See also United States v. Barnhart,* 979 F.2d 647 (8th Cir.1992) (holding each execution of a scheme is a violation of § 1344 without specifically rejecting each act in furtherance of a scheme as a violation). This interpretation is consistent with, if not required by, the words of § 1344, which provide for the punishment of "[w]hoever knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a financial institution."[11]

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[10] *See also United States v. Harris,* 805 F.Supp. 166, 173-74 (S.D.N.Y.1992); *United States v. Mancuso,* 799 F.Supp. 567, 570 (E.D.N.C. 1992).

[11] At the time of the bank frauds charged in Counts 1 through 30 the statute read as follows:

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—

The government argues we are constrained by our decision in *United States v. Poliak,* 823 F.2d 371, 372 (9th Cir.1987), to interpret the bank fraud statute as we interpreted the statute on which it was modeled—the mail fraud statute—which criminalizes each use of the mails in furtherance of a scheme to defraud.

Our decision in *Poliak* does not require a holding that each act in furtherance of a scheme to defraud a financial institution is a violation of the bank fraud scheme. *Poliak* involved a scheme to defraud through a check kiting scheme. Each count in *Poliak* charged the kiting of a separate check. We held the language of § 1344 "allows charging each execution of the scheme to defraud as a separate act," and that each check kiting transaction constituted "a different and separate execution of the scheme to defraud the banks." 823 F.2d at 372. As the First Circuit said in *Lilly,* in a check kiting scheme, "each check signifies a separate transaction requiring a separate issuance of money or credit on the part of the victimized bank." *Lilly,* 983 F.2d at 804; *see also Lemons,* 941 F.2d at 317 n. 5 (finding no conflict with *Poliak*).

Interpreting the bank fraud statute as punishing each execution of a fraudulent scheme rather than each act in furtherance of such a scheme is consistent with the Congressional intent to give the statute "the same broad scope as the mail fraud statute." *United States v. Bonallo,* 858

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(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, § 1108, 98 Stat. 2147 (1984) (current version in 18 U.S.C. § 1344).

F.2d 1427, 1432 (9th Cir.1988).[12] This interpretation has no effect on the range of fraudulent activity within the statute's reach. *See Lilly*, 983 F.2d at 304. It affects only the number of offenses to which such activity may give rise.[13]

If each act in furtherance of a scheme to defraud a bank were a separate violation, a single criminal transaction could result in an infinite number of prosecutable offenses having no particular relevance to the purpose of the statute. *Lemons*, 941 F.2d at 318.[14] In contrast, per-

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[12] The House Report states:

> The new section would prohibit devising a scheme to defraud a financial institution, or to obtain property of such an institution, and engaging in conduct in furtherance of such scheme. The section thus parallels the language of the current mail fraud and wire fraud statute ("scheme to defraud"), and is intended to incorporate case law interpretations of those sections.

H.R.Rep. No. 901, 98th Cong., 2d Sess. 4 (1984). This language suggests no more than that the words "scheme to defraud" should be interpreted in the same way as they are under the mail fraud statute. The Senate Report indicates that the bank fraud statute was modeled after the mail statute because it has been construed "to reach a wide range of fraudulent activity." S.Rep. No. 225, 98th Cong., 1st Sess. 378 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3518.

[13] Even if we could agree with the government that the intent of Congress to give the statute a broad scope provides some support for the position that each step in furtherance of a bank fraud scheme is a separate indictable offense, at best this view of the legislative history renders the language of the statute ambiguous. Faced with a statute susceptible of two reasonable interpretations, the rule of lenity requires that we choose the harsher interpretation "only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292 (1987).

[14] We have sought to avoid such a result in determining whether a criminal statute permits multiple-count indictments. *See United States v. Jewell*, 827 F.2d 586, 588 (9th Cir.1987) ("If every minor action that Jewell took in relation to the contract could be

mitting the prosecution of each act of mailing in furtherance of a scheme under the mail fraud statute limits the charges to conduct violative of the statute's purpose to prevent misuse of the mails and avoids the potential for an infinite multiplication of counts because the potential number of offenses is at least limited to the number of mailings.[15]

We therefore reaffirm our holding in *Poliak* that the unit of the offense created by § 1344 is not each act in furtherance of a scheme to defraud but each execution or attempted execution of the scheme to defraud.

"Obviously the question in each case is what constitutes an 'execution of the scheme.' " *Lemons*, 941 F.2d at 317 n. 5. The answer to that question depends upon the particular facts of each case. It is the government's "backup" argument that if each act in furtherance of the scheme does not constitute a separate offense, the allegations and proof in this case reflect five distinct executions of the scheme: (1) the transfer of 136 Cherokee Village units to Mangano alleged in counts 1 through 15; (2) the subsequent transfer of an additional 37 Cherokee Village units to Mangano alleged in counts 17 through 22; (3)

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considered a separate matter under [18 U.S.C. §]208(a), his participation in the contract could be multiplied into endless criminal counts.").

[15] The government argues the potential for infinite counts, and consequently infinite sentences, is negated by the sentencing guidelines, which require grouping of closely related counts for purposes of sentencing. Indeed, were this a guidelines case, all thirty bank fraud counts would be grouped and the sentence would be determined by reference to the amount of the loss. U.S.S.G. §§ 3D1.2.-3 (requiring grouping of counts where the offense level is determined largely on the basis of the total amount of harm, loss or quantity of substance involved, and specifically providing that crimes involving fraud and deceit are such offenses); *see also* U.S.S.G. § 2F1.1. However, because the offense conduct here predated the effective date of the guidelines, the sentencing guidelines have no application to this case.

the listing of DeCarlo, Dariano and Calvello as the borrowers on the loans involved in the second transfer to make it appear they were the purchasers, as alleged in counts 23 through 28; (4) the concealment of Mangano's ownership of the five North Palm Springs parcels on which Ramona paid assessment bonds alleged in count 16; and (5) the transfer of the Rancho Cielo property to Robert Rumney alleged in counts 29 and 30.

We agree with this analysis except that we regard (2) and (3) as integral parts of a single execution of the overall scheme: the record entries involved in (3) do not constitute a new transaction; they were made solely to conceal Mangano's role in the transaction involved in (2), which had already been consummated.

With this exception, each of these executions of the overall scheme were chronologically and substantially independent. None depended on the others for its existence. Each had its own functions and purpose—they were interrelated only because they involved the same overall scheme to use Ramona's resources to finance defendants' real estate ventures.

The first transfer of 136 Cherokee Village units constituted an execution of a scheme to defraud separate from the second transfer of 37 Cherokee Village units. The second transfer of a group of Cherokee Village units was a new occasion on which concealment of Mangano's involvement was necessary to avoid Board scrutiny that would threaten defendants' ability to continue the exploitation of Ramona.[16] The payment of the bond assessment

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[16] These two transactions are similar to the separate extensions of a loan agreement found to be separate executions of a scheme to defraud in *Harris*. *See* 805 F.Supp. at 174-75. The defendants in *Harris* were charged with misrepresenting the net worth of their corporation in obtaining a loan and six separate extensions of that loan. The court found the loan and each extension constituted a line of credit for a limited period. Each request for an

on Mangano's property, execution (4), and the Rumney transactions, execution (5), were distinct in time and purpose from the Cherokee Village sales and from each other. The objective of the former was simply to cause Ramona to pay bond assessments on Mangano's property; the objective of the latter was to facilitate the sale of Ramona to Stump.

C. *Constructive Amendment or Prejudicial Variance*

Mangano argues the government changed the theory of its case on the bank fraud counts—that the indictment alleged a scheme to defraud Ramona but the government's proof related to a scheme to defraud the Board. Mangano argues this change in theory constituted either a constructive amendment of the indictment not approved by the grand jury or a prejudicial variance between the allegations and the proof at trial.[17] Neither occurred.

Mangano argues that by relying on misrepresentations made to the Board rather than Ramona to support counts of the indictment alleging violations of § 1344, the prosecution constructively amended those counts to charge a

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extension was a new occasion for the bank to consider extending the limited period. The defendants were faced with a new obligation to be truthful regarding their corporation's net worth each time they sought an extension. *Id.* at 175. Mangano appears to argue that because the transactions had a single purpose—the acquisition of Cherokee Village—they must be a single execution of a scheme to defraud. However, as the analysis in *Harris* demonstates, two transactions may have a common purpose but constitute separate executions of a scheme where each involves a new and independent obligation to be truthful.

[17] A constructive amendment occurs when the proof at trial supports a crime other than the crime charged in the indictment. *United States v. Pisello*, 877 F.2d 762, 765 (9th Cir.1989). A variance occurs when "the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir.1984) (quoting *United States v. Cusmano*, 659 F.2d 714, 718 (6th Cir.1981)).

new offense since § 1344 applies only to fraud against a bank, not against a governmental agency.

Mangano relies on *United States v. Blackmon*, 839 F.2d 900 (2d Cir.1988). The fraud alleged in *Blackmon* was directed only against customers of the bank and did not expose the bank to a risk of loss. *Id.* at 904-05. *See also United States v. Hubbard*, 889 F.2d 277, 280 (D.C. Cir.1989) (distinguishing *Blackmon* because the bank in *Hubbard* was exposed to a risk of loss by defendant's theft and fraudulent negotiation of a check). Here, in contrast, Ramona was plainly the victim of appellants' fraud; their conduct directly jeopardized the bank's solvency.

The fact that appellants' misrepresentations were designed to conceal their fraudulent conduct from the Board does not mean the appellants defrauded only the regulators. Concealment of Mangano's role from the Board was one facet of a scheme to use Ramona's deposits to engage in real estate transactions that jeopardized Ramona's assets. Appellants could continue to use Ramona's deposits to finance their real estate ventures only so long as they were able to conceal Ramona's financial instability from federal regulators and thus avoid what eventually occurred—the closing of Ramona by the Board. Appellants cannot escape liability for this scheme to defraud Ramona simply because effectuating the scheme also required them to conceal the true nature of their transactions from the Board.

Nor was there a variance between indictment and proof. The scheme alleged in the indictment plainly included concealment of the true nature of the Cherokee Village sales from the Board.[18]

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[18] For example, the indictment alleged appellants intended to "placate the Board by taking Cherokee Village off Ramona's books," (Indictment ¶ 19), and to conceal Mangano's participation because the transaction would have been "frowned on" by federal regulators had they known the purchaser was Mangano, (Indictment ¶ 24).

III. *Conspiracy*

Mangano argues the government failed to prove the existence of an agreement with Molinaro to accomplish either of the alleged objectives of the conspiracy: (1) to defraud the United States by impeding, impairing, obstructing and defeating the performance by the Board of its lawful function and (2) to defraud Ramona by making false entries in its books and records relating to Mangano's sale of the Cherokee Village units back to Ramona.

The jury could infer the existence of an agreement between Molinaro and Mangano to impede the operation of the Board from the abundant evidence that they joined in structuring the transactions and preparing the necessary documentation in such a way as to conceal Mangano's participation from the Board. Although Molinaro instructed Patricia Mangano to make the entries in Ramona's records and the notation on the check, the jury could infer Molinaro and Mangano agreed to the instruction from the evidence of Mangano's underlying control of the sale and his motive to conceal his role in it.

IV. *Jury Instructions*

A. *Intent to Defraud*

Appellants argue the district court improperly refused to instruct the jury that to convict the defendants of a violation of subsection (2) of the bank fraud statute it must find Ramona was deceived by the fraudulent misrepresentations.[10] With respect to subsection (2) of the bank fraud statute, the jury was instructed it must find the defendants engaged in "a scheme to obtain money or prop-

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[10] The jury was instructed correctly with respect to subsection (1), which makes punishable the execution of a scheme to defraud a bank and does not require proof of a misrepresentation. *See United States v. Ragosta*, 970 F.2d 1085, 1089 (2d Cir.1992). The jury was instructed the scheme must be to defraud Ramona.

erty from Ramona by false representations or pretenses." Appellants argue that, because the district court failed to add "to Ramona," the instruction permitted the jury to find appellants guilty of bank fraud solely on the basis of misrepresentations to the Board.

Appellants rely upon our statement in *United States v. Lew*, 875 F.2d 219, 221 (9th Cir.1989), that the mail fraud statute requires proof of an intent "to obtain money or property from the one who is deceived." In *Lew*, we reversed a mail fraud conviction of an immigration attorney charged with filing false applications to the Department of Labor on behalf of his clients because the district court explicitly directed the jury it could find the defendant guilty of a scheme to defraud his clients of money or property without finding the defendant made any false representations to his clients.

In determining whether the district court correctly explained the law, "we may look beyond the instructions themselves and examine the indictment and the entire trial in context." *United States v. Dischner*, 974 F.2d 1502, 1520 (9th Cir.1992) (citation and internal quotation marks omitted). Viewing the entire charge in the context of the whole trial, the jury could not have been confused as to the victim of the fraud. *See id.* (affirming a mail fraud instruction that the jury must find the "defendant acted with the intention of obtaining money or property by means of false statements" even though the court did not add "from or to the alleged victim" where, "[g]iven the way the case was charged and tried, the jury could not have been confused as to the victim of the fraud."). As alleged in the indictment and argued to the jury, the bank fraud scheme involved the submission by appellants to Ramona of loan applications and other documents that fraudulently concealed the identity of the true purchaser of Cherokee Village. Appellants did not dispute the fact that the documents alleged to be false were submitted to Ramona. Accordingly, if the jurors found those documents contained fraudulent omissions

and misrepresentations there could be no confusion that those misrepresentations were made to Ramona.[20]

B. *Good Faith Instruction*

Appellants argue that the district court's good faith instruction was erroneous because: (1) the judge refused to instruct the jury that a good faith belief in the economic viability of the transaction would be a defense to bank fraud, and (2) the judge did not remind the jury that all the elements of the crime must be proven beyond a reasonable doubt. Neither claim has merit.

The court gave the following instruction:

> You may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant's belief that the victim of the fraud will be paid in the future or will sustain no economic loss is no defense to the crimes charged in the indictment.

The court's instruction accurately stated the law. "While an honest, good-faith belief in the truth of the misrepresentations may negate intent to defraud, a good-faith belief that the victim will be repaid and will sustain no loss is no defense at all." *United States v. Benny,* 786 F.2d 1410, 1417 (9th Cir.1986).

Appellants argue the fraud charged in this case is like that involved in a check-kiting scheme where a good faith belief in repayment is a defense. As the court said in *Benny,* "[i]f the defendant reasonably believed he or she

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[20] **While the prosecution may have emphasized in its closing argument that appellants deceived the federal regulators, it did so because the scheme to defraud Ramona necessarily included deceiving the Board, and, more importantly, because the indictment also charged appellants with a conspiracy to defraud the United States.**

could cover [the check], there was no intentional misrepresentation and hence no crime." *Id.* This is plainly not such a case. Appellants' belief in the economic viability of the transactions would not make their concealment of Mangano's role in those transactions unintentional. In any event, as noted in *Benny*, "[n]o court has extended the repayment defense beyond check-kiting cases." *Id.*

The court's failure to remind the jury that all elements of the crime must be proven beyond a reasonable doubt was not error: the court expressly instructed the jury to this effect on several other occasions.[21]

V. *Admission of Evidence of Prior Bad Acts*

Mangano argues that evidence of certain dividend payments he and Molinaro received from Ramona was irrelevant and inadmissible under Fed.R.Evid. 404(b), which bars admission of evidence of "crimes, wrongs, or acts" to prove an individual's propensity to commit the crime charged. *See United States v. Sarault,* 840 F.2d 1479, 1485 (9th Cir.1988). The evidence was relevant to prove appellants' intent. Appellants argued in their opening statement they could not have intended to defraud Ramona because they had invested their own money in Ramona and any losses to the bank would fall upon them. Evidence that Molinaro and Mangano had taken dividends from the bank exceeding their original $2,000,000 investment undermined this claim.

Mangano also argues the dividend payments were not prior *bad* acts because the payments were lawful. Prior acts need not be unlawful to be admissible under Rule 404(b)—the rule refers to evidence of other "crimes, wrongs, or *acts.*" (Emphasis added). The critical requirement is that the evidence be offered for a purpose other

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[21] Molinaro alleges various other errors with respect to the district court's formulation of the jury instructions. None has merit.

than to prove the defendant's propensity to engage in the conduct charged.

VI. *Presence of Alternate Jurors During Deliberations*

Federal Rule of Criminal Procedure 24(c) provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Over the government's objection, appellants' attorneys asked that the alternate jurors be permitted to remain in the jury room during deliberations. The district judge granted the request and instructed the alternate jurors to remain in the jury room but not to participate in the deliberations or indicate their views. Appellants argue that in the absence of personal consent by the defendants themselves, the presence of alternates requires reversal *per se*.

The Supreme Court's decision in *United States v. Olano*, —— U.S. ——, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), controls this case. The attorneys in *Olano*, like counsel here, consented to the presence of the alternate juror and the juror was instructed not to participate in deliberations, but the defendants did not personally consent to the procedure. The Supreme Court assumed without deciding that Rule 24(c) is nonwaivable, but held the defendants were not entitled to relief absent a showing they were prejudiced by the alternate's presence during deliberations. *Id.* —— U.S. at ——, 113 S.Ct. at 1779-81. Appellants, too, have failed to demonstrate prejudice from the alternates' presence.

VII. *Denial of Molinaro's Suppression Motion*

Molinaro challenges the denial of his motion to preclude the prosecution from using statements he made in the course of plea negotiations for impeachment or as investigative leads.

The court's ruling was not error with respect to the statements Molinaro made after he signed the plea agreement. The prosecution expressly reserved the right to

use these statements against Molinaro if he breached the plea agreement, and Molinaro breached the agreement by withdrawing his guilty plea.

Molinaro claims the prosecutor gave him use immunity with respect to statements he made prior to signing the plea agreement. However, the district court found as a matter of fact that the prosecution expressly reserved the right to use the statements for impeachment purposes and investigative leads; and the court's finding was not clearly wrong.

VIII. *Application of the Sentencing Guidelines*

The district court did not err in refusing to sentence Mangano pursuant to the Sentencing Guidelines. The conduct alleged occurred between 1984 and 1986. The guidelines apply only to offenses committed on or after November 1, 1987. *United States v. Rewald,* 835 F.2d 215, 216 (9th Cir.1987), *amended* 902 F.2d 18 (9th Cir.1990).

Conclusion

The judgment is AFFIRMED, except that the sentences are vacated and the case is REMANDED for resentencing. Since the government's proof at trial was sufficient on each of the counts, although some of the counts charging a scheme to defraud under 18 U.S.C. § 1344 are multiplicitous, and also on each of the executions of the scheme, a sentence can be imposed on each count but must run concurrently with every other sentence on a count that is part of the same execution. As we have said, counts 1-15 relate to a distinct execution of the scheme, count 16 is a distinct execution of the scheme, counts 17-28 constitute a distinct execution of the scheme, and counts 29-30 charge a distinct execution of the scheme. Counts 31, 32, and 33 charge offenses other than executions of the scheme to defraud under § 1344. We vacate the sentences on these counts as well because they may have been influenced by the judge's interpretation of the unit of the offense under § 1344.

[Filed Dec. 31, 1988]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR 87-952(B) KN

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN LEE MOLINARO, and
DONALD P. MANGANO, SR.,
Defendants.

ORDER Re Motions

The Court, having received and considered the various motions filed by defendants, and having heard testimony and the arguments of counsel, hereby rules as follows.

* * * *

B. *Mangano's Motion to Dismiss Counts 1 through 27*

Defendant Mangano has moved to dismiss Counts One through Twenty-Seven of the Superceding Indictment, on the ground that they do not allege twenty-seven separate violations of 18 U.S.C. § 1344.

Section 1344 provides in pertinent part:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a federally chartered or insured financial institution; or
>
> (2) to obtain any of the monies, funds, credits, assets, securities or other property owned by or under the custody or control of a federally

> chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Counts One through Twenty-Seven of the First Superceding Indictment allege that the defendant, for the purpose of executing and attempting to execute a scheme to defraud Ramona Savings and Loan Association, caused twenty-seven documents to be signed and submitted. Each document related to the sale of a particular unit of the Cherokee Village development. The Second Superceding Indictment is drafted in similar fashion; Counts One through Twenty-One refer to documents signed and submitted to Ramona. Counts Twenty-Two through Twenty-Seven refer to various entries made in the books and records of Ramona.

Defendant argues that the statute is intended to punish only the "scheme" to defraud, of which there was only one, rather than each act taken in furtherance of that scheme. The Government, on the other hand, argues that the various counts of the indictment refer to the purported sale, on at least two dates, of different condominium units, sold to one of three different "buyers," at different prices, involving the submission of distinct loan/purchase documents.

In *United States v. Poliak*, 823 F.2d 371 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1586 (1988), the Ninth Circuit upheld the validity of an indictment charging ten counts of bank fraud under § 1344. *Poliak* involved ten checks drawn as part of a check-kite scheme. The Ninth Circuit rejected the defendant's contention that the ten fraudulent checks be charged as a single scheme of bank fraud, holding that the statutory language "plainly and unambiguously allows charging each execution of the scheme to defraud as a separate act," and that each check was a "different and separate execution of the scheme to

defraud the banks." 823 F.2d at 372. The court stated that its interpretation of § 1344 was supported by the mail and wire fraud statutes, upon which the bank fraud statute was patterned. "Under the mail fraud statute each mailing in furtherance of the scheme constitutes a separate violation." *Id*; *see also United States v. Jones*, 648 F. Supp. 241, 243 (S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds, United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988). The Ninth Circuit has taken a broad approach in its interpretation of § 1344. This Court therefore finds that the Superceding and Second Superceding Indictments are properly drafted to allege separate counts of § 1344. Defendant's motion is therefore DENIED.

[Filed Sep. 19, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-50133
D.C. No. CR-87-0952-Kn-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD P. MANGANO, SR.,
Defendant-Appellant.

No. 90-50375
D.C. No. CR-87-0952-Kn-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD P. MANGANO, SR.,
Defendant-Appellant.

ORDER

Before: BROWNING, SCHROEDER, and FLETCHER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

STATUTE INVOLVED

18 U.S.C. § 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.